82-1883

NO. 83-

in the Supreme Court of the United States

October Term, 1982

ROBERT F. FEHLHABER, as Personal Representative of Fred Robert Fehlhaber, deceased,

Petitioner,

vs.

VERONE MARIN FEHLHABER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In an attempt to convince this Court to grant the Petition for Writ of Certiorari, Petitioner (hereinafter "Fred")[1] has presented a version of the "facts" colored with innuendo

[1]Fred Fehlhaber, the Defendant in the California state court proceeding and the Florida federal action, was the husband of the Respondent, Verone Fehlhaber. Fred died in 1980 during the pendency of the appeal (six years after the commencement of the California action) and Robert F. Fehlhaber, the personal representative in probate proceedings, was substituted. However, for the sake of clarity, this Brief will continue to refer to Petitioner as Fred.

and inaccurate or incomplete statements. Petitioner portrays himself as a hapless victim "caught in a mesh of procedural complexities" due to the preclusive effect given to a California default judgment awarding his ex-wife (hereinafter "Verone") a cash award equal to one-half of the value of community and quasi-community property alleged in her complaint. However, as stated by the Fifth Circuit:

> Fred's equitable position is not so strong as he asserts. He was given full and proper notice of the California proceedings, specially appeared to contest jurisdiction, lost on this issue, and then ignored the proceedings. He did not act in ignorance but rolled the dice and lost.

(App. at B-3.)[2]

This reply brief will provide a statement of the facts and correct some of the inaccuracies contained in the Petition. Once the full statement of facts and procedural background is before the Court, it becomes abundantly clear that this case does not warrant the exercise of discretionary jurisidiction requested by Petitioner. No novel issues of constitutional law are presented by this case nor does the Fifth Circuit's opinion conflict with decisions by the Fourth Circuit or any other circuit. Rather, the opinion is perfectly consistent with the well recognized principles of full faith and credit which bar collateral attack of all valid judments including default judgments.

Statement of the Facts.

Petitioner's characterization of the parties and the California state court proceedings contain repeated, flagrant misstatements of facts. While Petitioner begins his statement

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[2]All citations to the Appendix refer to the Appendix submitted by Petitioner and are herein abbreviated "App." The Joint Appendix submitted to the Court of Appeals is designated as "Jt.App."

of facts with an uncontested statement, to-wit, that the parties were married in New York in 1961, he quickly deviates from the actual set of circumstances as found by the California court and makes a de novo argument of "facts" notwithstanding the state court's contrary holdings.

Respondent, Verone, instituted proceedings in the California state court for legal separation, spousal support, attorney fees, costs and determination of property rights on May 17, 1974. Fred was personally served with process and appeared specially to contest jurisdiction, alleging that he was a resident of Florida, not of California. (Jt.App. at 21.) Both Fred and Verone presented evidence on the issue of residence and jurisdiction in the California proceeding.[3]

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[3]Verone's evidence showed that until 1961 she was a resident of California. During that year, Verone married Fred in New York. In the year 1968, Verone and Fred moved to California. While in California, they arranged for the sale of their New York home, which was concluded in 1969. From 1968 to their separation, the parties spent most of their time in California. (App. at A-2.) Their move to California was motivated by the fact that Fred suffered from severe emphysema and the humidity conditions on the east coast made his condition only worse. (*Contra*, Jt.App. at 24.) Specific evidence of Fred's contact with California included the fact that Fred instituted litigation in California courts alleging his residency in California (Jt.App. at 19), maintained bank accounts (the California court finding that Fred had absconded with $100,000 from one California bank account, Jt.App. at 132) and memberships in country clubs and other social clubs in California, and transacted business in California. Fred and Verone retained two year-round servants in California, had two automobiles in California and their personal physicians were in California. For the most part, their friends were in California. Verone also submitted evidence that Fred had no business interests in Florida, although he directed some of the activities of Fehlhaber Corporation, a New York operation, from California and elsewhere.

Verone also presented evidence that in April, 1974, after their winter in Florida, Fred told Verone to return to California, and that he would meet her there later. After Plaintiff returned to California, Fred informed her over the telephone that he never wanted to see her again. Because of Fred's statements, Verone filed an action for legal separation on May 17, 1974, truthfully stating that the parties were California residents.

(Continued on Page 4)

On July 15, 1974, the California court, after considering extensive declarations and documentation, and despite Fred's intensive arguments,[4] denied his motion to quash service and held that California had jurisdiction because the parties were residents of California. (Jt.App. at 58.) The court determined that it was not necessary to and did not rule on the issue of whether Fred was also a domiciliary.[5]

(Footnote 3 Continued)

Certain of these assertions by Verone do not appear of record in the federal action though Fred's responses to each of the assertions appear at Jt.App. pages 23-28 and 33-57. Fred contested Verone's version of the facts but the California trial court clearly believed Verone's evidence to be more credible and convincing.

[4]*See*, Jt.App. 23-28, 33-57 containing Fred's version of the facts regarding residency. In the Petition for Writ of Certiorari, Fred's version is presented as "fact" and not as argument notwithstanding the prior adjudication rejecting his contentions. In contrast, Respondent has attempted to identify for the Court matters which are disputed and which cannot be deemed to be "facts" *per se*.

[5]*See* App. at A-26, n.25 and accompanying text: "This issue [whether Fred and Verone were domiciled in California] was disputed by the parties in the California Court when Fred made a special appearance to quash summons but was never adjudicated. *The court ruled that Fred was a resident* and that this was sufficient under California's long arm statute, even in matrimonial cases. *No ruling was made whether Fred was a domiciliary.*" (emphasis supplied.) Following the holding that the Court did have jurisdiction and Fred's default, Fred never challenged the holding that residence alone was sufficient to exercise jurisdiction and in fact Fred no longer contests the propriety of the California court's exercise of personal jurisdiction over him. (App. at C-6.) Moreover, under California's community law, residence and domicile are synonymous. *Cooper v. Cooper*, 269 Cal.App. 2d 6, 74 Cal. Rptr. 439 (1969). See also California Civil Code §5002 (maintenance of a residency in California, although departed from the state, is prima facie evidence that the person was domiciled in California). Thus, Fred's continued contention that the Court specifically held he was not a domiciliary is inaccurate and in any event is of no consequence in light of subsequent events.

Thus, Petitioner's statement that the parties "resided together in Florida from 1967 until April 1974, when respondent left Fred and went to California" is simply an incorrect, self-serving argument, contrary to the conclusions reached by the California court. Fred did not take an appeal from that California determination but instead simply ignored or evaded all subsequent California proceedings. Having lost on the jurisdictional issue, Fred apparently felt that he had nothing further to gain inasmuch as California law requires that the court make an equal distribution of assets regardless of fault.[6] However, Fred received timely notice in each instance of all subsequent proceedings.[7]

Six days after being served with the California Summons and Process, Fred filed for divorce in the State of Florida. (Jt.App. at 9.) Verone immediately obtained and served upon Fred a restraining order against Fred which prohibited him from prosecuting the Florida action. (Jt.App. at 59-60.)

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[6]Fred's choice to take no further part in the California proceeding, once California determined it had jurisdiction, was arguably only because he had nothing to gain by further appearances and contest. Since the court determined that the parties were residents of the state, Fred could not have prevented a division of community and quasi-community assets. Fred may also have feared contempt citations from the California court for his violation of the California court's restraining order relative to his Florida proceeding and for his willful failure to provide support to Verone. Furthermore, Fred had previously removed all tangible and intangible assets (except household furniture and furnishings) to New York and Florida. It is certainly conceivable that Fred feared that if he made a further appearance in California, additional proof may have been made regarding existence of additional community assets, especially in foreign banks over and above that which Verone had knowledge of and adduced in the California proceeding.

[7]Verification of all notices given to Fred and his attorneys of all California proceedings are contained in the record of the District Court and specifically in the Affidavit of R. Stephen Duke (incorrectly identified on the docket sheet, Jt.App. p.2, as Stephen P. Duke) filed on February 27, 1978 in the District Court.

Fred and his California attorney, as well as his Florida attorney, were personally served with a copy of the California restraining order. Notwithstanding such order and in defiance thereof, on July 23, 1974, Fred obtained a Florida default judgment of dissolution of marriage, which only dissolved the marital *res*. The Florida decree did not decide or rule on any of the remaining property or support matters. (Jt.App. at 62.)[8] Moreover, contrary to Fred's assertion made on page 4 of the Petition, the Florida decree was not ever made an issue by Fred in the California proceeding. (App. at C-16.)

On March 18, 1976, the California court entered its Judgment on Reserved Property Issues, determining, by its specific findings of fact and conclusions of law, and, based upon the evidence before it, that community and quasi-community property had a value of $19,000,000 and awarded Respondent one-half thereof in cash as her share of the property pursuant to California Civil Code, Sections 4800 and 4800.5. (Jt.App. at 119-132.) Although Petitioner was served and had actual notice of each order and judgment, he took no action in California to contest or appeal from the specific findings of fact, conclusions of law, orders or judgments.

It is also a fact that the Judgment on Reserved Property Issues was based upon documentation and testimony obtained from, among others, Fred's business agent (who also managed the parties' business located in New York) at his deposition concerning the parties' property and assets. Based upon testimony and evidence including financial statements circulated by Fred in order to obtain contracts in New York

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[8]Fred continues to maintain by footnote 2 of his Petition that the Florida divorce divested the California court of subject matter jurisdiction over Verone's action. The Fifth Circuit soundly rejected this argument. See App. at A-7 to A-11. *In re Marriage of Lusk*, 86 Cal.App. 3d 228, 150 Cal.Rptr. 63 (1978) and related cases cited by the Fifth Circuit's opinion make unequivocally clear that Petitioner's argument is absolutely spurious.

on large public installations, Verone prepared a Request for Admissions of Fact and served these on Fred. (Jt.App. at 86-98). The majority of the individual assets identified on the Request were listed and quoted securities and cash. Petitioner failed to respond or answer the Requests. Accordingly, pursuant to California law (Code of Civil Procedure, Sections 2033 and 2034), Respondent moved the California court to have the Request for Admissions deemed admitted as to the values and specific description of the assets. (Jt.App. at 112-116.)

As stated by the Circuit Court, "Fred was given specific notice that Verone intended to have the request for admissions deemed admitted by his failure to respond." (App. at B-3.) Petitioner's statement that as a defaulting party he was *prohibited* from responding to those requests is merely a conclusory allegation based upon a misstatement of California law.[9] His default and failure to answer did constitute an admission that all facts recited in Verone's pleading were true.

Finally, it is absoutely uncontested that at no point did Fred move to vacate, amend or otherwise contest the California judgments at the trial court level. Fred also chose not to take an appeal from that judgment or any one or more of the orders, judgments, or specific findings of fact or conclusions of law of the California court.

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[9]As will be discussed more fully in the section regarding "Method of Proof", the case relied upon by Petitioner, *Jones v. Moers*, 91 Cal.App. 65, 266 P. 821 (1928) does not stand for the proposition that a defaulting party may not file *any* pleadings. The holding in *Jones* is only that an answer or pleading filed after the date of default responding to the complaint itself is a nullity. *See, Forbes v. Cameron Petroleums, Inc.*, 83 Cal.App. 3d 256, 147 Cal. Rptr. 766 (1978). *Cf. McKim v. McKim*, 6 Cal. 3d 673, 100 Cal.Rptr. 140, 493 P.2d 868 (1972) (in a proceeding on a petition for dissolution of marriage, testimony of a defaulting respondent is *not* inadmissible).

The Proceedings Below.

Succinctly stated, the proceedings in the Southern District of Florida were simple collection proceedings initiated by Verone pursuant to 28 U.S.C. §1332 to enforce the California judgments. The District Court determined that pursuant to principles of full faith and credit Verone was entitled to summary judgment[10] for $516,750 for unpaid support together with unpaid costs and attorney's fees and for $12,114,991.41 consisting of the cash award, attorney fees, costs and interest. (App. D.)

Fred appealed from the district court judgment in favor of Verone and the Fifth Circuit at first reversed the judgment in part by a vote of two-to-one. (App. C.) That first opinion was based primarily on the Circuit Court's interpretation of a California case, *Buller v. Buller*, 62 Cal.App. 2d 687, 145 P.2d 649 (1949), which it felt allowed a collateral attack pursuant to California law. In reliance upon *Buller*, the Circuit Court initially characterized the California proceeding as non-statutory and therefore in excess of the state court's power on the misapprehension that the prior judgment in the Florida proceeding had divested the California court of jurisdiction. The dissent indicated that the Florida judgment

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[10]Fred continues to vigorously argue that entry of summary judgment was in and of itself error because Fred was not "allowed" to take discovery. This is a gross misstatement of the proceedings below. Fred did notice Verone's deposition to be taken in Miami, Florida. Verone filed a motion for a protective order based in part upon her well founded fear of physical violence. The Court ruled that Verone need not appear for deposition in Florida until one week before trial. (Jt. App. at 1, entry of June 8, 1977.) However, at no time did the trial court prohibit Fred from taking Verone's deposition in California or otherwise prohibit Fred from serving discovery upon her in terms of interrogatories, requests to produce or requests for admissions. Additionally, Verone's attorneys noticed and did take her deposition in California in the federal proceeding (Jt. App. at 2, entry of February 27, 1978) but Fred and his attorneys chose not to attend. Thus, the assertion that Fred was not "allowed" to take discovery is an absolute mischaracterization of the actual proceedings below.

was not raised as a defense in the California proceeding and that the California judgment was *res judicata*.

On petition for rehearing, the Fifth Circuit concluded that its original decision was incorrect, withdrew the opinion and substituted the opinion found in Appendix A. The Fifth Circuit upheld the District Court's order as modified.[11]

On rehearing, the Circuit Court held that under the full faith and credit provision of 28 U.S.C. §1738 it was required to determine whether the California judgment was subject to collateral attack under the "basic limitations of federal law" (due process) or under California law. The Court correctly concluded that the California court initially had properly obtained jurisdiction and that the prior Florida divorce did not divest the California court of continuing jurisdiction under the California statute. The Court also held that the California court did not exceed its power or jurisdiction in granting an entire cash offset and that the cash award was not subject to collateral attack; that the method of proof was not subject to collateral attack; and that the issue of jurisdiction over alleged quasi-community property was not properly preserved for appeal inasmuch as Fred's oblique reference to a purported constitutional challenge was abandoned and never briefed or argued below. Each of these holdings was thoroughly explained by the Court of Appeals and will be discussed more fully, *infra*.

In short, the Court recognized the vital purpose underlying the principles of full faith and credit and *res judicata* that

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[11]The Court limited the amount of the property judgment to cash in an amount equal to $7,500,000 or one-half of the largest amount pleaded in the Complaint (or "Petition" as it is labeled in California). This cured any arguable error as alleged by Fred that the relief granted exceeded the prayer for relief. *See Becker v. S.P.V. Construction Co., Inc.*, 27 Cal. 3d 489, 165 Cal.Rptr. 825, 828 (1980) (discussed *infra*). Respondent does not wish to take issue with that determination by the Fifth Circuit.

rulings must be given full recognition and finality to avoid repetitive burdensome litigation. Fred, by refusing to participate in California proceedings or to appeal from any facet thereof, was deemed to have lost the right to now, many years later, challenge the propriety of the judgment by collateral attack.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

The Court of Appeals Correctly Applied the Principles of Due Process and Full Faith and Credit in Rejecting Each of the Three Purported Errors in the California Proceeding as a Basis for Collateral Attack

Petitioner asserts that the California judgment should not be accorded full faith and credit because it lacks due process of law. However, Petitioner totally fails to support this contention. In fact, his brief recognizes that the Court of Appeals applied the notice standards of due process, but then states that his due process rights required more. The truth is, Fred simply "rolled the dice and lost." He ignored the California proceedings after he lost on the jurisdictional issues. Thereafter, he received proper and actual notice of all subsequent proceedings. He cannot demonstrate any grounds for denying full faith and credit to the California judgments under due process standards.

Rather than discussing relevant cases in asserting due process violations, Petitioner relies on the Fourth Circuit opinion in *Compton v. Alton Steamship Company*, 608 F.2d 96 (4th Cir. 1979), which he wrongly tells this Court involved a collateral attack on a default judgment. The facts of the instant case and the *Compton* decision are completely distinct. In reality, there was no collateral attack in *Compton*. A

direct appeal was involved. Thus, *Compton* provides no support for Petitioner's contention that due process requires an analysis on the merits of the California judgment under a "fundamental fairness and considerations of justice" component of due process considerations.[12]

The cases which *do* discuss the due process requirements inherently limiting application of full faith and credit do not consider the issue of fundamental fairness from a substantive approach but limit the examination of the underlying judgment to a procedural due process analysis. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed. 2d 262 (1982) and *Underwriters National Assurance Company v. North Carolina Life and Accident*, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed. 2d 558 (1982) (discussed further herein).

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[12]In *Compton*, a seaman brought an action in the Federal District Court for the Eastern District of Virginia, claiming unpaid wages against the defendant company. After defendant failed to appear, a default judgment was entered in favor of the plaintiff. Defendant "was shocked into action" by the amount of default and, *ten days* after receiving notice of the judgment, filed a motion to set it aside under Federal Rules of Civil Procedure, Rule 60, claiming mistake, inadvertence, etc. This motion was denied, and defendant filed a direct appeal to the Fourth Circuit. Accordingly, no collateral attack was involved. The Fourth Circuit reversed the denial of the motion to vacate and in fact vacated the judgment under Federal Rule of Civil Procedure 60(b).

The *Compton* decision did not involve a state court judgment wherein the defendant failed to take any action by motion or appeal or otherwise as in the instant case. In the present case, Fred appeared in the California proceeding to contest jurisdiction in the California courts and lost. He could have moved to vacate the judgments under California Code of Civil Procedure Section 473 but did not do so. Nor did he appeal the judgment. It was not until Respondent filed her collection proceedings in the Federal District Court of Florida that Petitioner first attempted to contest the California judgment and then only by an improper collateral attack. The Federal District Court rejected his attempted collateral attack and the Fifth Circuit Court of Appeals affirmed, holding that there were no due process violations, and that the California judgment was properly entitled to full faith and credit.

As recognized by the Appellate Court, full faith and credit can be approached analytically as comprising two separate concepts. First, full faith and credit requires only that the judgment entered by a state court be given the amount of recognition that the state courts in the rendering state would give the judgment. This is not a part of any constitutional due process analysis but a pragmatic definitional aspect of the "credit due" a foreign judgment.[13] Thus, if the default judgment herein was subject to collateral attack in California it would be subject to collateral attack in the Florida federal proceeding. For the reasons set forth herein

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[13]The Appellate Court raised the question whether consideration of this first factor has in essence been subsumed into the analysis of the Due Process Clause of the Constitution. However, *Kremer, supra*, explicitly recognized that a federal court must consider the state's own rules to determine the preclusive effect due a judgment to qualify for the full faith and credit guaranteed by federal law:

> Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. *Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken. M'Elmoyle v. Cohen*, 13 Pet. 312, 326, 10 L.Ed. 177 (1839); *Mills v. Duryee*, 7 Cr. 481, 485, 3 L.Ed. 411 (1813). As we recently noted in *Allen v. McCurry, supra*, "though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts[,] *Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.*" 449 U.S., at 96, 101 S.Ct., at 416.

(Continued on Page 13)

and in the opinion contained in Appendix A, the Court found that the purported "errors" or "deficiencies" raised by Petitioner were not of a type which California courts would view as appropriate grounds for collateral attack.

The second level of analysis under both statutory and constitutional full faith and credit is the well recognized concept that federal principles of due process limit applicability of full faith and credit. Thus, as correctly stated by Petitioner, if a judgment is entered in violation of due process it is void and is subject to collateral attack. However, Petitioner gives an overly broad reading to the due process requirements not justified by the opinions of this Court.[14]

The Appellate Court, after a very methodical analysis of this Court's most recent discussions of full faith and credit, concluded that the due process limitations on recognition of judgments is very narrow with the principle focus being

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(Footnote 13 Continued)

Id. at 102 S.Ct. 1897. Thus, whether or not considered as a subset of due process, consideration of the "credit" owed to a foreign judgment pursuant to §1738 clearly requires a federal court to examine the preclusive effect California would give the default judgment. As more fully explained, *infra*, California would consider this judgment as *res judicata* in any collateral proceeding.

[14]In essence, Petitioner attempts to assert lack of subject matter jurisdiction because of the purported "irregularities" in the type of evidence upon which the California court relied, the nature of relief granted Verone and because of alleged unconstitutionality of the California quasi-community property statute as applied to Fred. None of the three "errors" go to the actual issue of subject matter jurisdiction. "Subject matter jurisdiction" means only that a court must have "jurisdiction or power to deal with the *class* of cases in which it renders judgment." 7 MOORE'S FEDERAL PRACTICE ¶60.25[2], at 302 (2d ed. 1982). A court's determination that it does in fact have jurisdiction over the subject matter, assuming personal jurisdiction exists, is not subject to collateral attack. *Id.* at 306. This is true even if the judgment in issue is a judgment by default. *Id.* at 308.

on *jurisdiction* over the person, full *notice* of the litigation, and an *opportunity* to participate in the proceedings.

The following pertinent portions of *Kremer* amply support the Circuit Court's logic:

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue. . . . "[R]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of the *procedures followed* in the prior litigation." *Montana v. United States*, 440 U.S., at 164 n.11, 99 S.Ct., at 979 n.11. Cf. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973).
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> The State must, however, satisfy the applicable requirements of the Due Process Clause. A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment and other state and federal courts are not required to accord full-faith-and-credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the state from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.[24]
>
> [[24]The Court's decisions enforcing the Full-Faith-and-Credit Clause of the Constitution, Article IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the *procedural requirements of due process. Sherrer v. Sherrer*, 334 U.S., at 348, 68 S.Ct., at 1089 (*"there is nothing in the*

> *concept of due process which demands that a defendant be afforded a second opportunity to litigate. . . the existence of jurisdictional facts"*). Section 1738 was enacted to implement the Full-Faith-and-Credit Clause, . . . and specifically to insure that federal courts, not included within the constitutional provision, would be bound by state judgments. *Davis v. Davis*, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26 (1938) ("The Act extended the rule of the Constitution to all Courts, federal as well as state"). It is therefore reasonable that § 1738 be subject to no more restriction than the Full-Faith-and-Credit Clause.]

Kremer, supra, 102 S.Ct. at 1897-98 (certain citations omitted) (emphasis supplied).

Similarly, *Underwriters National Assurance Company v. North Carolina Life and Accident*, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982), supports the Fifth Circuit's opinion that the determination by the California court of jurisdiction and an independent determination by the Fifth Circuit that Fred in fact had notice and an opportunity to litigate compels the conclusion that the California judgment be given preclusive effect:

> This Court has long recognized that "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues." . . . Any doubt about this proposition was definitely laid to rest in *Durfee v. Duke, Supra*, 375 U.S. at 111, 84 S.Ct. at 245, where this Court held that "a judgment is entitled to full faith and credit—*even as to questions of jurisdiction*— when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.[13]

> [[13]The need for finality within our federal system, . . . applies with equal force to questions of jurisdiction. As this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165, 172, 50 S.Ct. 134, 137, 83 L.Ed. 104 (1938), "[a]fter a party has his day in court, with *opportunity to present his evidence and his view of the law*, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."]
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> * * *
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> *A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding.* See *Sherrer v. Sherrer*, 334, U.S. 343, 352, 68 S.Ct. 1087, 1091, 92 L.Ed. 1429.

102 S.Ct. at 1366, 1368 (citations omitted) (emphasis supplied).

After being served with process in the California action, Fred specially appeared to challenge the court's jurisdiction over his person, but lost. Fred did not seek direct review of that determination, nor does he now contest this ruling. Thus, the California court's ruling is *res judicata* and cannot be revisited by a collateral attack. Clearly the California court was empowered to adjudicate this type of case and possessed subject matter jurisdiction. Additionally, it is abundantly clear that Fred had the opportunity to litigate in California each of the grounds which he now urges as error. Fred, having had notice and an opportunity to litigate the matter in a court of competent jurisdiction was not denied due process in connection with the rendition of the California judgments.

A. The California Judgment On Property Rights Was Based Upon Testimony and Evidence Properly Presented and In Any Event the Method of Proving Damages May Not Be Collaterally Attacked.

Petitioner improperly claims that the California judgment on property was error because it was "entered without any proof as to the existence, character or value of the alleged assets." This is completely untrue.[15]

In addition to Verone's testimony and the deposition of Fred's business agent, the California court also relied upon the Request for Admissions (which detailed each asset and value) to which Fred refused to respond and based its award on the value of assets identified therein. Petitioner does not cite nor can he cite any California cases holding that this would provide grounds for a collateral attack under California law. Federal principles of full faith and credit and due process likewise do not provide a basis for collateral attack because of alternate methods of proof.

The Requests for Admission were deemed admitted by Petitioner's failure to respond thereto.[16] An admission is valid evidence upon which to base a judgment. However, contrary to the facts in the instant case, even if the California court did not take any evidence to support the judgment on property, such failure would not be grounds for collateral attack under California law. Although Section 585(b) of the California Code of Civil Procedure requires proof to be taken to ascertain the amount of damages in the event of a default,[17] any judgment that does not comply with Section 585(b) only amounts to error to be cured by direct (not

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[15] *See* n.9, *supra*, and accompanying text.

[16] Petitioner's assertion that he was prohibited from doing so will be more fully discussed, *infra*.

[17] *See also* §4511 of the California Civil Code.

collateral) attack. *Baird v. Smith*, 216 Cal. 408, 14 P.2d 749, 751 (1932). *See also Gray v. Hall*, 203 Cal. 306, 313, 265 P. 246, 251 (1928); *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 341 (1925).

Petitioner argues that under federal due process principles notice does not suffice in this situation because (a) Fred was prohibited from responding to the Request for Admission and (b) the award exceeded Fred's total net worth. Neither point has any factual or legal merit and cannot provide a basis for ignoring the mandate of full faith and credit.

Fred's contention that he was prohibited from filing a response to the Request for Admissions is entirely wrong. *Jones v. Moers*, 91 Cal.App. 65, 266 P. 821 (1928), cited by Petitioner, held that an answer filed after entry of default is unauthorized. *See also Forbes v. Cameron Petroleums, Inc.*, 83 Cal.App. 3d 256, 147 Cal.Rptr. 766 (1978). However, Fred fails to draw a distinction between a response to request for admissions and an answer. A response to a request for admissions is not a responsive pleading within the meaning of *Jones* and hence may not be excluded by a declaration of default. California Civil Code Section 2033(a) provides that a request for admissions may be served on any party who has been served with a summons.[18] *See Zorro Investment Co. v.*

[18]The legislative purpose of the request for admissions statute is to determine triable issues of fact. Such a purpose is separate from that of a responsive *pleading* which is to join as many issues as possible. *Zorro, supra.* Hence, an answer to a request for admission is not deemed a responsive *pleading* within the meaning of *Jones, supra.* The ruling of *Jones* operates to exclude parties, not evidence; and although it operates to divest a defaulting party of his right to appear in opposition in Court, it does not divest the Court of its power or the right to procure evidence. By analogy, the exclusion of a party who has not answered a complaint and who is therefore in default cannot prevent the excluded party from answering the request for admissions. Where evidence is taken after default, as was done in the instant cause, evidentiary matter may be obtained by any means from any party who has ben *served with Summons.* §2033(a) California Code of Civil Procedure. An extension of *Jones* to a

(Continued on Page 19)

Great Pacific Securities Corp., 69 Cal.App. 3d 907, 138 Cal. Rptr. 410 (1977). Moreover, in *McKim v. McKim*, 6 Cal.App. 3d 673, 100 Cal.Rptr. 140, 493 P.2d 868 (1972), the court specifically held that under California law a party in default in a dissolution proceeding could appropriately give testimony.

Fred had the right to a direct appeal on this issue of the propriety of the manner of proof. *E.g., Zorro Investment Company, supra.* He chose not to do so. There is no question but that under California law a party in default has the right to appeal from a judgment and particularly on the grounds of an excessive or improper award. *Uva v. Evans*, 83 Cal.App. 2d 363, 364, 147 Cal.Rptr. 795, 800 (1978); *Buck v. Morrossis*, 114 Cal.App. 2d 461, 250 P.2d 270 (1952); *Richee v. Gillette Realty Co.*, 97 Cal.App. 365, 275 P. 477 (1929).

Petitioner's second point is that the facts deemed admitted were incorrect, and had the effect of grossly overstating his net worth, relying primarily on the facts found at a bond hearing before the District Court *three years* after entry of the California judgment. Fred's net worth in 1976 was not before the Court during the bond hearing which Fred did not attend despite a subpoena served on him requiring his attendance. Proceedings on the bond determination is an entirely different matter than the underlying judgment and

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(Footnote 18 Continued)

defaulting party failing to answer request for admissions would divest the non-defaulting party of his right to request admissions where, in fact, such request for admissions are designed to protect the active litigants. any interpretation which would prevent the expenditious determination or elimination of triable issues of fact would clearly be against public policy and judicial economy. Nothing in the law and nothing in the California Constitution, codes or cases or under the U.S. Constitution or law prohibits a defaulting party, when requested, from testifying or giving evidence.

should not even be considered in ruling on the Petition for Writ of Certiorari.[19]

The Court of Appeals reviewed the propriety of a collateral attack under federal principles of law on the grounds here asserted: that the method of proof may have had the effect of overstating Fred's net worth thus constituting such manifest injustice as would permit a collateral attack. (App. at A-18 to A-23.) The Fifth Circuit correctly concluded that this case does not fall within the narrow exception permitting a collateral attack. (App. at A-23.)[20] In distinguishing this case from *Bass v. Hoagland*, 172 F.2d 205 (5th Cir. 1949) *cert. denied*, 359 U.S. 816, the Court of Appeals remarked as follows:

> Also, unlike the defendant in *Bass*, Fred was served with the property division judgment and therefore might have appealed it or moved to set it aside under the more lenient "six month" rules. *See*

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[19]The Court below did not find that the judgment exceeded Fred's net worth many times over as of the date it was entered. The only proof regarding Fred's net worth taken during hearings on bond to be posted pending appeal was to ascertain Fred's worth in *1979* not as of *1976*.

Nor has it ever been proven by Petitioner that the value of the parties' assets were less than that stated in the California judgment at the time said judgment was entered. Similarly, though the Court "found" in the bond hearing that Fred's total "net worth" was approximately $600,000 it also set bond at $1,500,000. Fred posted an amount equal to the bond by depositing a portion of the *exact securities* described in the California court's findings of fact. The $600,000 figure resulted from the fact that Fred had transferred many millions of dollars worth of assets to a revocable trust. (Jt.App. at 163.) As further security pending appeal, the District Court also enjoined transfer or disposition of the trust assets as well as other assets. (Jt.App. at 170-171.)

[20]As the dissent in *Bass* points out, it is questionable whether such an exception to the prohibition on collateral attack exists if jurisdiction was properly exercised by the first court and no appeal was taken. *See Kremer* and *Underwriters, supra*, which suggest the correctness of the *Bass* dissent.

> Cal.Code Civ.Pro. §473 (allowing relief from judgment within six months for, *inter alia*, surprise and excusable neglect). Finally, in *Bass*, the court gave considerable emphasis to the denial of the defendant's Seventh Amendment right to a jury trial. 172 F.2d at 209, 210. Unlike in *Bass*, Fred does not claim a constitutional right to a jury trial in the California state court, nor did Fred make a demand for a jury trial.

(App. at A-21.)

This Court has stated that no hearing is required by the Due Process Clause when a defendant is in default. *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113 (1971). Fred was not foreclosed from presenting or contesting evidence concerning the valuation of the marital estate in the California proceeding. Even though he did not appear at the default proceeding, Fred could still have moved to vacate that default and to set aside the judgment, or, he might have appealed the default judgment in the California proceeding. He failed to do either and, accordingly, he has had all the protection due him by law.

B. The California Petition Encompassed a Demand for Cash Offset and the California Court had Complete Discretion to Award All Assets to One Spouse with an Equal Cash Award to the Other Spouse which Discretion was Properly Exercised Under the Circumstances Presented

Petitioner argues that under California law, the relief granted (a cash offset) was in excess of the prayer for relief and thus void. Petitioner also argues that the type of relief granted was not authorized by statute. The latter argument is not carried to a conclusion that if not authorized by statute, the judgment was in excess of the Court's power; however, the contention was made and rejected below, both

as to the legal validity of the conclusion and as a permissible grounds for collateral attack.

The contention that the judgment is void under California law because in excess of the prayer for relief is clearly refuted by *Badillo v. Badillo*, 123 Cal.App. 3d 1009, 177 Cal.Rptr. 56 (1981). In *Badillo* the wife filed her Petition for Dissolution under the Family Law Act. The Petition requested that property rights "be determined as provided by law." She did not make any request for specific assets or manner of division of property. Husband was personally served, but allowed a default judgment to be entered. In its judgment, the court awarded certain assets to Husband and Wife and also gave Wife the family residence. Husband did not appeal the judgment. Later, Husband filed suit against Wife's estate claiming an interest in the family residence awarded to Wife in the dissolution judgment. The trial court found against Husband. On appeal, Husband contended that the dissolution judgment was in excess of the wife's prayer and thus void and subject to collateral attack. The California Court of Appeal disagreed holding that although the division may not have been in compliance with the equal mandates of California Civil Code §4800, the relief awarded was within the scope of the prayer for disposition "according to law." Therefore, the judgment was not void or subject to collateral attack (although it may have been an abuse of discretion subject to direct appeal).

As in *Badillo*, the prayer for relief in Verone's California Petition requested that "property rights be determined as provided by law." (Jt.App. at 7.) Thus, Petitioner's argument that the judgment in the instant case was void because in excess of the prayer for relief is directly contradicted by *Badillo*.

In an attempt to manufacture a federal due process claim based upon the language of the prayer for relief,

Petitioner claims in his Petition that the *Badillo* decision is inapplicable because it was rendered some seven years after he defaulted. He reasons that he did not have constitutional notice of this decision at the time he decided to default and, therefore, he should not be bound by the interpretation of the prayer for relief given by *Badillo.* However, the notice required under the Due Process Clause is notice of the pendency of the proceedings. Moreover, *Badillo* considered the import of a ruling entered at least two years *before* Verone filed suit in California.[21]

Petitioner's continued reliance on *Wilkinson v. Wilkinson* 12 Cal.App. 3d 1164, 91 Cal.Rptr. 372 (1970) is misplaced. In *Wilkinson* the wife prayed that specific community property be awarded to her and the court awarded a cash offset. Therefore, the judgment was in excess of the prayer for relief. In this case, Verone did not request any specific award of community property. Fred was served with the Summons and Complaint wherein Respondent requested that she be accorded property as provided by California law and wherein in she claimed that the community estate was in excess of $15,000,000. Fred was thereby notified that Verone could obtain at least one-half of that amount from the California courts, but Fred intentionally refused to take part in the California proceedings.[22]

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[21]Even if the judgment did exceed the prayer for relief the entire judgment is not void but only that portion which exceeds the prayer. *See Becker v. S.P.V. Construction Co. Inc.*, 27 Cal. 3d 489, 165 Cal.Rptr. 825, 828, 612 P.2d 915 (1980). The Fifth Circuit therefore limited the judgment to one-half of the maximum amount alleged as community property by Verone's Petition. See n.11, *supra.*

[22]Assuming arguendo that the judgment did exceed the prayer for relief, Petitioner's basis for collateral attack could only be based on the notions that full faith and credit requires that a judgment be given only as much preclusive effect as the state courts would give it. Contrary to Petitioner's assertions, a judgment would not be void under federal law if the relief granted exceeds the prayer for relief. As is typical of the

(Continued on Page 24)

Petitioner further alleges that the California judgment is not entitled to full faith and credit because the California court was required to divide the marital property "in kind" as opposed to the cash offset used. Petitioner intentionally ignores the fact that the California Supreme Court has explicitly and unequivocally held that the determination as to the method of division (in kind, cash offset, or combination of those methods) is entirely within the sound discretion of the trial court. *In re Marriage of Connolly*, 23 Cal. 3d 590, 603, 153 Cal.Rptr. 423, 591 P.2d 911 (1979); *In re Marriage of Fink*, 25 Cal. 3d 877, 160 Cal.Rptr. 516, 603 P.2d 881 (1979).[23] In *Emmett v. Emmett*, 109 Cal.App. 3d 753, 169 Cal.Rptr. 473 (1980) the court stated:

> Nothing in the language of Civil Code section 4800 requires a distribution of the community property in kind. The mandate of that section is that the community property must generally be divided

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(Footnote 22 Continued)

Petition, the case cited by Petitioner for the proposition that "a judgment in excess of the prayer is void and subject to collateral attack" under federal law is completely devoid of any reference to the proposition for which it is cited. The closest reading of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) fails to provide any support for Petitioner's argument. In fact, the law is to the contrary. Such a judgment is *not* void under federal law and thus is not subject to collateral attack on the ground that the right involved in the suit did not embrace the relief granted. *See Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932); *Walling v. Miller*, 138 F.2d 629 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944).

[23]Petitioner's statement that no California case can be found that would support a cash award of community property is totally in error. *See, e.g., Weinberg v. Weinberg*, 67 Cal. 2d 557, 63 Cal.Rptr. 13 (1967); *Phillips v. Phillips*, 152 Cal.App. 2d 582, 313 P.2d 630 (1957); *Pope v. Pope*, 102 Cal.App. 2d 353, 227 P.2d 867 (1951).

equally. An equal division is not necessarily equated with a division in kind.

Thus, the Court's award herein of all assets to Fred and cash equal to one-half of the assets to Verone was not in excess of the Court's powers and not subject to collateral attack.[24]

C. Petitioner Could Have Appealed from the California Judgment if He Felt It Was Improper but May Not Now Launch a Collateral Attack on California Community Property Laws.

Petitioner's final argument regarding "error" by the California trial court is that the California Judgment on Property violated California's quasi-community statute, Civil Code Section 4803 as limited by *Addison v. Addison*, 62 Cal. 2d 558, 43 Cal.Rptr. 97, 399 P.2d 897 (1965) and *In re Marriage of Roesch*, 83 Cal.App. 3d 96, 147 Cal.Rptr. 586 (1978), *cert. denied*, 400 U.S. 915 (1979). As the Court of Appeals in its decision of August 6, 1982 remarked, Petitioner

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[24]In the exercise of its discretion regarding distribution of assets, the California court was forced to deal with the problem that most of the assets were freely transferable securities and cash; that all assets had been removed from California and were in the possession and control of a party who would not obey California court orders; that the same may have been disposed of during the lengthy period between filing of the action and the final trial of the issues of asset distribution. All of these factors dictated the cash award in the sound discretion of the California trial court. Additionally, the largest single asset identified was the stock owned by the parties in the Fehlhaber Corporation. The trial court had before it Fred's affidavits regarding the Corporation stating that he was the sole shareholder of that corporation and that he controlled all activities and made all business decisions for that corporation. The Court may have properly concluded that the circumstances more than justified allowing Fred to retain ownership of the parties' business and thus avoid conflict. *E.g., In re Marriage of Winn*, 98 Cal.App. 3d 363, 159 Cal.Rptr. 554 (1979); *In re Marriage of Clark*, 80 Cal. App. 3d 417, 145 Cal.Rptr. 602 (1978) (court has discretion to award stock in a closely held corporation to one party and give the other a cash offset).

did not properly preserve this issue for appeal. Moreover, even if the point had been properly preserved, the contention is entirely without merit.

The Fifth Circuit pointed out that Fred made only an oblique, ambiguous reference to some purported "constitutional" problem in his answer to the supplemental complaint and in his motion for a new trial. (App. at A-24.) Fred did not develop this argument in "his briefs to the Court, through oral argument, or through citation of authority." (App. at A-24.) He never raised this point in his memorandum opposing the motion for summary judgment. Nor did he raise this point in his pretrial stipulation. Accordingly, the Fifth Circuit concluded the issue has been abandoned. *Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co.*, 629 F.2d 1118 (5th Cir. 1980); *U.S. v. Indiana Bonding and Surety Company*, 625 F.2d 26, 29 (5th Cir. 1980); *Tedder v. FMC Corp.*, 590 F.2d 115 (5th Cir. 1979); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 263 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 650, 13 L.Ed. 556.

Petitioner claims that this quasi-community property argument should be allowed on his appeal although he had not preserved the issue below on the basis of fundamental fairness, citing *Compton v. Alton Steamship Company, supra.* As explained, *supra*, *Compton* is totally inapposite to this case. Additionally, even if the argument were properly preserved for appeal it would not be grounds for denying the California judgment its preclusive effect.

Petitioner raised the same argument in his motion to quash service in the California court wherein he contended that domicile was necessary under California law in order for the court to have jurisdiction to award support and *property.* The California court ruled against Fred on this contention, holding that residence alone was sufficient although

the parties may or may not have been domiciled in California.[25] Fred had the opportunity to attack this ruling in the California courts by direct appeal or by motion to vacate, but did nothing. That ruling is not now subject to collateral attack under California law.

The parties lived in California for many years and owned property, some of which may have been acquired before moving from New York to California. Property so acquired might have been labeled as "quasi-community" if the same were not comingled with community property; however, if comingled all of the property would simply become community property.[26] If petitioner participated in the California proceedings, he might have produced evidence to permit a distinction for the purpose of his present and unfounded argument; however, such was not the case and Petitioner has not now identified any asset designated as "quasi-community."

The allegation that the California statute is unconstitutional does not provide a basis under federal due process concepts for collateral attack. It is well established that even where a judgment is predicated upon a statute later declared unconstitutional, that fact does not provide a basis for collateral attack. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981); *Elgin National Watch Co. v. Barrett*, 213 F.2d 776 (5th Cir. 1954). Thus, even if the California quasi-community statute were deemed to violate some provision of the Constitution, which is vigorously denied, Petitioner may not now raise that issue as a basis for collateral attack on the California judgment.

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[25]See n.5, *supra*, and accompanying text. *See also* Jt.App. at 33-57.

[26]For example, the Court found that the interest in Fehlhaber Corporation had become so comingled that it was community not quasi-community property. (Jt.App. at 130.)

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari to review the determination of the Court of Appeals for the Fifth Circuit should be denied.

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Respectfully submitted,

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